No. 87-851

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

ROGER CLARK, CARL BUSHEY, JOHNNY RUSSELL, TERRY FISCHER, AND BART VIGLIEMO,

Petitioners,

v.

MOMENCE PACKING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM OF THE RESPONDENT

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January 11, 1988

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QUESTIONS PRESENTED

The petitioners present three questions for review. The first is whether an employer may remove an action for retaliatory discharge to federal court where the employee is covered by a collective bargaining agreement subject to Section 301 of the Labor Management Relations Act.

The second question presented is whether 28 U.S.C. Section 1445 (c) which bars the removal of actions arising under a state's workman's compensation law is applicable to the petitioner's claim for wrongful discharge where the petitioner is covered by a collective bargaining agreement which has a "just cause" provision.

The third question presented by the petitioners is whether Section 301 of the Labor Management Relations Act provides the exclusive remedy for a unionized employee and therefore preempts any action in a state court for retaliatory discharge.

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MEMORANDUM OF THE RESPONDENT[1]

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[1] Pursuant to Rule 28.1, respondent states Momence Packing Company is an Illinois Corporation that has no subsidiaries or affiliates and is not itself a subsidiary or affiliate and has no parent corporation.

ARGUMENT

1. The issues raised by the Petitioners have been categorically decided by this Court; and therefore, the petition for Certiorari should be denied. This Court has previously held, as a matter of law, that suits for breaches of collective bargaining agreements are properly removed to Federal Court and are preempted by Section 301 of the National Labor Relations Act where the state court tort claims are inexorably intertwined with the issues arising within the collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 88 L.Ed. 2d 206, 105 S.Ct. 1904 (1985).

In *Allis-Chalmers*, the employee was covered by a collective bargaining agreement which empowered the arbitrator to provide the final dispute resolution. *Allis-Chalmers*, 88 L.Ed. 2d 206. The employee in *Allis-Chalmers* filed a state court action based on a tort theory involving a disability claim and the Wisconsin Supreme Court held that this action could stand as an independent tort action for violation of the disability plan. This Court however, reversed the Wisconsin Supreme Court and held that the tort claim was so "rooted" within the terms of the collective bargaining agreement that the state tort claim "could have been pleaded as a contract claim under Section 301". *Allis-Chalmers Corp.*, 85 L.Ed. 2d at 221. This Court held that Federal Labor Law preempted the state tort action and that the failure of the plaintiff to exhaust the internal contract remedy provided in the collective bargaining agreement mandated that the entire matter be dismissed. *Allis-Chalmers Corp.*, 85 L.Ed. 2d at 221.

The present case is factually similar to *Allis-Chalmers* because it is undisputed that the petitioners here were employees bound by a collective bargaining agreement with a concurrent grievance procedure and language that gave the arbitrator the exclusive power to determine the parties' rights in a dispute. Also as in *Allis-Chalmers*, the petitioners filed a state court tort action. The petitioners here filed a retaliatory discharge claim in state court

alleging that they had been terminated for filing a workman's compensation case. As in *Allis-Chalmers*, the petitioners' tort claim involved questions of whether their termination was "for cause" within the provisions of the collective bargaining agreement, and required an interpretation of the collective bargaining agreement and resolution through the grievance procedure. In this case, as in *Allis-Chalmers*, the question of the contractual provisions were so intertwined with the state court tort claim so that they "could have been pleaded as a contract claim under Section 301"; and therefore, the claim must either be treated as a Section 301 claim, or dismissed as pre-empted by federal labor contract law.

In the present case, the District Court and the Seventh Circuit correctly applied the holding in *Allis-Chalmers* and treated petitioners' state court claim as really one arising under Section 301. The District Court correctly held, and the Seventh Circuit affirmed, that the entire case should be dismissed because the state court action was preempted by Section 301 and the petitioners failed to exhaust the internal union grievance procedure. Therefore, the petition for a writ of certiorari should be denied.

2. While this Court has recently accepted certiorari on the case of *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir., 1987) *cert. granted*, No. 87-259, the respondent here believes that the petition in the present case should be denied because all issues raised have been definitively resolved by the case of *Allis-Chalmers, Supra*.

3. Petitioners erroneously attempt to distinguish this case from *Lingle, Supra*, on the basis that the federal district court obtained jurisdiction based on the removal statute. 28 U.S.C. Secton 1441. However, this Court has previously and definitively decided this issue and has held that "when 'the heart of the [state law] complaint [is] a . . . clause in the collective bargaining agreement,' . . . that complaint arises under federal law," and is therefore,

properly removed to federal court within the meaning of 28 U.S.C. 1441. *Caterpillar Inc. v. Williams*, ___ U.S. ___, 125 LRRM 2521 (U.S., 1987), citing *Avco v. Machinists*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed. 2d 126 (1968). This court held that where a federal statute has completely preempted the field, then any state cause of action "that comes within the federal cause of action necessarily arises under" federal law and is properly removed. *Caterpillar Inc. v. Williams*, 125 LRRM 2521 (U.S., 1987); citing *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed. 420 (1983).

In the present case, as stated above, this is an action for retaliatory discharge filed by employees covered by a collective bargaining agreement and is so intertwined with the "just cause" provisions of the collective bargaining agreement so as to make it an action "arising under" the federal law; and therefore, properly removed to federal court under the removal statute. Since this court has previously determined that the federal law completely preempts any actions involving the interpretation of a collective bargaining agreement, and since those cases arise under federal law and are properly removable, the petitioners' application for a writ of certiorari should be denied. See *Caterpillar Inc. v. Williams*, 125 LRRM 2521 (U.S., 1987) and *Avco v. Machinists*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed. 2d 126 (1968).

4. Further, petitioners' argument that this court should accept certiorari in the present case even if it does not accept certiorari in the cases of *Baldracchi v. Pratt & Whitney*, 814 F.2d 102 (2d Cir. 1987) *cert. pending*, No. 87-318 and *Willoughby v. Central Ill. Light Co., cert. pending*, No. 87-417 is also without merit. Again, all of the issues raised in *Baldracchi*, *Willoughby*, as well as those raised in the present case, have been clearly decided by the case of *Allis-Chalmers, Supra;* and therefore, the petition should be denied.

5. Petitioners continued reliance on 28 U.S.C. 1445 (c), which prohibits the removal of actions arising under a state's workman's compensation law, is equally non-meritorious and clearly not subject to a petition for certiorari. As stated above, this court has already held that an action by an employee covered by a collective bargaining agreement is really an action seeking to enforce the terms of the agreement and is governed by Section 301 of the Labor Management Relations Act. *Avco v. Machinists, Supra.* According to *Avco*, this action is not, as a matter of law, an action arising under the state's workman's compenstion law; therefore, Section 1445 (c) is inapplicable to the present cause of action. Petitioner's request for a writ of certiorari should be denied.

6. Petitioners' assertion that this Court should grant their petition in order to distinguish this case from the case of *Caterpillar Inc. v. Williams*, ___ U.S. ___, 125 LRRM 2521 (U.S., 1987), is entirely without merit. In *Williams*, the plaintiff's claim was based on an individual employment contract and not on a collective bargaining agreement as in this case. This Court was careful to distinguish claims founded directly on Section 301 of the National Labor Relations Act from those founded on individual employment contracts and held that "individual employment contracts" are separate and apart from rights created by a collective bargaining agreement. *Williams* at 2524. This Court held that any claim made pursuant to an individual employment contract does not fall within the Section 301 preemption because it does not depend on an interpretation of the collective bargaining agreement and is therefore, purely a state court action. *Williams* at 2524.

In the present case, petitioners have never maintained that they had an employment contract separate and apart from the collective bargaining agreement as in the *Williams* case. The *Williams* case is not applicable to the present case and the determination of whether the

petitioners' termination was proper is necessarily dependent upon the terms of the collective bargaining agreement. Therefore, the holding in *Allis-Chalmers, Supra*; rather then *Williams, Supra*, is applicable to the present case. As previously stated, the District Court and Court of Appeals correctly applied *Allis-Chalmers* to the present case and the petition for a writ of certiorari should be denied.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied and the judgment of the Court of Appeals summarily affirmed.

Respectfully submitted,

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January 11, 1988

APPENDIX

STATUTES INVOLVED

28 U.S.C. Section 1441(a)(b)(c):

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. Section 185(a):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

28 U.S.C. SECTION 1445(c) provides:

> A civil action in any State Court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.